United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

MPM:ee
75-0343
n-1705

76-6009

To be argued by
MARY P. MAGUIRE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-6009

MARCELINA DIAZ RIVERA DE GOMEZ,

Plaintiff - Appellant,

-v-

HENRY A. KISSINGER, Secretary of State of the United States, et al.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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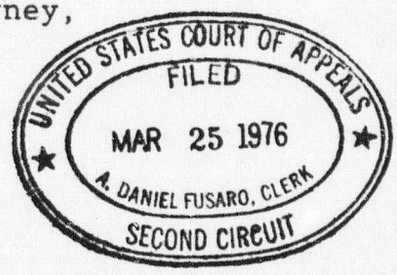

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Plaintiff - Appellant,

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BRIEF FOR DEFENDANTS - APPELLEES

Statement of the Issue

Whether the District Court erred in holding that it lacked jurisdiction to review the acts of American consular officials abroad in determining whether or not to issue a visa.

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Statement of the Case

This is an appeal from an order of the Honorable Charles L. Brieant, United States District Judge for the Southern District of New York, entered on January 5, 1976, granting defendants - appellees' motion for summary judgment.

The plaintiff - appellant, Marcelina Diaz Rivera De Gomez, instituted this action for a declaratory judgment pursuant to 28 U.S.C. §2201 et seq. and alleged that jurisdiction was based on Section 279 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1329. An additional or alternate basis of jurisdiction was alleged under the mandamus statute, 28 U.S.C. §1361. Plaintiff - appellant sought to review the action of the United States Consul in the Dominican Republic with respect to the visa application of plaintiff - appellant's husband.

The District Court held that it lacked jurisdiction to review the acts of American consular officials abroad in determining whether or not to issue a visa and granted the motion of defendant's - appellees for summary judgment.

Statement of the Facts

Plaintiff - appellant Marcelina Diaz Rivera De Gomez ("Gomez") is a fifty-one year old United States citizen.

On July 26, 1972 Gomez travelled to Santo Domingo in the Dominican Republic for a two-week vacation. Shortly after her arrival in Santo Domingo, on July 30, 1972, she was introduced to Cecilio Trifilio Gomez-Tejada ("Gomez-Tejada"), a then twenty-five year old native and citizen of the Dominican Republic, who had recently divorced his wife by whom he had two children. They were married the next day and on August 10, 1972 Gomez returned to New York.

On September 18, 1972 Gomez filed a petition with the New York District office of the Immigration and Naturalization Service (the "Service") to accord Gomez-Tejada the status of an immediate relative pursuant to Section 201(b) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1151(b). Such status would exempt Gomez-Tejada from the numerical limitations on Western Hemisphere immigration and from the labor certification requirement of Section 212(a)(14) of the Act, 8 U.S.C. §1182(a)(14), thus easing the way for him to obtain an immigrant visa. The Service approved Gomez' petition on January 31, 1973 and forwarded the approved petition to the United States Consul at Santo Domingo, Dominican Republic.

Thereafter, Gomez-Tejada submitted a formal

application for an immigrant visa to the United States Consul at Santo Domingo. As the result of an investigation conducted by the Consul in the Dominican Republic, the Consul had reason to believe that the marriage between plaintiff - appellant and Gomez-Tejada was a marriage of convenience entered into solely for the purpose of circumventing the immigration laws.* Acting pursuant to the authority contained in 22 C.F.R. §42.43(a), the Consul returned the approved visa petition to the Service in New York on June 11, 1974 for a determination as to whether the approval of the visa petition should be revoked pursuant to 8 C.F.R. §205.2.**

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* The facts uncovered by the consular investigation included the following: (1) Gomez-Tejada did not reside at the address shown on the visa application; (2) Gomez-Tejada continued to reside with his former wife and their two children; and (3) a child had been born to Gomez-Tejada and his former wife on September 2, 1973.

** During the pendency of the District Court action the Service did, in fact, revoke approval of the visa petition after confronting Gomez with the facts uncovered by the consular investigation and providing her with an opportunity to rebut such facts. The revocation of the visa petition was upheld on Gomez' appeal to the Board of Immigration Appeals. Gomez did not seek to amend the complaint to obtain review of that revocation nor has she instituted an independent action to review such revocation.

On May 10, 1974 Gomez instituted a declaratory judgment action in the District Court and asserted jurisdiction under Section 279 of the Act, 8 U.S.C. §1329. Plaintiff - appellant alleged 28 U.S.C. §1361, the mandamus statute, as an additional or alternative basis of jurisdiction. Defendants - appellees moved for summary judgment and, in granting the motion, Judge Brieant held that the court lacked jurisdiction to review the acts of American consular officials abroad in determining whether or not to issue a visa.

RELEVANT STATUTES

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 103, 8 U.S.C. §1103 -

> (a) The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens.... He shall establish such regulations; ... issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act....

* * *

Section 104, 8 U.S.C. §1104 -

> (a) The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas....

* * *

RELEVANT REGULATIONS

22 C.F.R. §42.2. Immediate Relatives.

> An alien who is a spouse, child, or parent of a United States citizen shall be classifiable as an immediate relative under Section 201(b) of the Act if the consular officer has received from the Immigration and Naturalization Service a petition filed in his behalf by a United States citizen and approved in accordance with section 204 of the Act and the consular officer is satisfied that the alien has the relationship to the United States citizen indicated in the petition....

22 C.F.R. §42.40 Effect of approved petition.

> Consular officers are authorized by the Secretary of State to grant, upon receipt of, and within the validity period of, a petition filed with and approved by the Immigration and Naturalization Service, the immediate relative or preference status indicated in the petition.

> The approval of a petition by the Immigration and Naturalization Service shall not relieve the alien of the burden of establishing to the satisfaction of the consular officer that he is eligible in all respects to receive a visa.

22 C.F.R. §42.43 Suspension or termination of actions in petition cases.

> (a) Suspension of action. (1) The consular officer shall suspend action in a petition case and shall return the petition, with a report of the facts in the case, for reconsideration by the Service if the petitioner requests suspension of action, or if the consular officer knows or has reason to believe that the approval of the petition was obtained by fraud, misrepresentation, or other unlawful means, or that the beneficiary is not entitled, for any other reason, to the status approved.
>
> * * *
>
> (b) Termination of action. The consular officer shall terminate action in a petition case upon receipt from the Service of notice of the revocation of the petition or upon a finding that the petition has been automatically revoked pursuant to 8 C.F.R. 205.1(a) or to 8 C.F.R. 205.1(b)(2) through (5).

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ARGUMENT

The District Court Correctly Held That It Lacked Jurisdiction to Review A Consular Decision Relating to the Issuance of a Visa

Under the clear wording of the Immigration and Nationality Act, the issuance of an immigrant visa is a matter vested solely in the discretion of the appropriate consular officer. Pursuant to Section 221(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1201(a), "a consular officer may issue (1) to an immigrant who has made proper application therefor, an immigrant visa which... shall specify...the preference, nonpreference, immediate relative or special immigration classification to which the alien is charged...." The burden of proof is on the alien applicant to establish to the satisfaction of the consular officer that he is entitled to the status claimed and that he is not subject to any of the exclusionary provisions contained in the Immigration and Nationality Act. Section 291 of the Immigration and Nationality Act, 8 U.S.C. §1361.

Since Congress has specifically vested consular officers with exclusive power to grant or deny a visa, such determinations have consistently been held to be exempt from either administrative or judicial review. Kleindienst v. Mandel, 408 U.S. 753 (1972); Burrafato v. U.S. Department

of State, 523 F.2d 554 (2d Cir. 1975), cert. denied, _____ U.S. _____ (44 U.S.L.W. 3466); Loza-Bedoya v. Immigration and Naturalization Service, 410 F.2d 343 (9th Cir. 1969); United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir.), cert. denied sub. nom United States ex rel. Ulrich v. Stimson, 279 U.S. 868 (1929); Licea-Gomez v. Pilliod, 193 F. Supp. 577 (N.D. Ill. 1960). "Whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to vise a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. See 3 Moore's Digest, 996. It is beyond the jurisdiction of the court." United States ex rel London v. Phelps, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928).

This unreviewable power of the consular officer to grant or deny a visa has withstood various constitutional attacks. As the Supreme Court stated in United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950):

> "Thus the decision to admit or exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer or the sovereign...the action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." Id. at 542-43.

See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210-15 (1953); Polymeris v. Trudell, 284 U.S. 263 (1932); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Petition of Joe Cahill, 447 F.2d 1343 (2d Cir. 1971).

In the Ulrich case, supra, an appeal from the dismissal of a mandamus action brought to compel the Secretary of State to direct the consul in Berlin to issue a visa, the Court of Appeals for the District of Columbia affirmed the dismissal, stating:

> "We are not able to find any provision of the immigration laws which provides for an official review of the action of the consular officers in such a case by a cabinet officer or other authority." Id. at 986.

In Mandel v. Mitchell, 325 F. Supp. 620 (E.D. N.Y. 1971), Judge Bartels, dissenting from the decision rendered by his brethern on the three-judge District Court impanelled to hear the attach upon the denial of a nonimmigrant visa to a Marxist scholar by an American consul in Belgium, grounded on the allegation that the sovereign power to exclude aliens must bow when it interferes with rights of citizens secured under the First Amendment, argued that the consul's determination was beyond judicial review:

> "While an alien who has entered this country may be expelled only after procedural due process, an alien on the threshold of initial entry stands on an entirely different footing... the requirement that aliens secure a visa from an American Consul abroad was first adopted as a security measure in 1917. Since that time statutory enactments, administrative interpretations and court decisions have uniformly held that the exercise of the Consul's determination was beyond judicial interference.
>
> In the area of alien exclusion the case for non-judicial review is particularly strong. Flexibility must be granted to the Consul under all sections of the Act in order to adapt the Congressional policy to the variable conditions with which the Consul is from time to time confronted. Frequently his decision to deny a visa is predicated upon confidential information, the disclosure of the sources of which might endanger the public security and in some cases might seriously adversely affect our foreign relations." Id. at 647-648.

Thereafter, in Kleindienst v. Mandel, supra, the Supreme Court reversed the three-judge panel and, in so doing, reaffirmed, as argued in Judge Bartel's dissent, that Congress not only has absolute power to adopt a policy excluding aliens, but also can and has extended such power to having that policy enforced exclusively through consular officers without judicial interference.

In an apparent attempt to circumvent the well-settled law with respect to the non-reviewability of consular decisions relating to visa insurance, appellant contends that Section 279 of the Act, 8 U.S.C. § 1329, provides a jurisdictional basis for review of such consular decisions. However, as this Court noted in Burrafato v. U.S. Department of State, supra, that argument must be considered in the light of repeated admonitions by the Supreme Court that the judicial branch should not intervene in the executive's carrying out the policy of Congress with respect to exclusion of aliens. In Kleindienst v. Mandel, supra, the Supreme Court recognized that First Amendment right were implicated, but held that judicial review was unavailable where the government had acted on "the basis of a facially legitimate and bona fide reason." Id. at 770. In reaching that conclusion the Court relied upon - and explicity declined to reconsider - an 1895 opinion in which the Court had declared:

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial interference, is settled by our previous adjudications." 408 U.S. at 766 (emphasis added), citing Lem Moon Sing v. United States, 158 U.S. 538, 547.

Thus, appellant's reliance on Section 279 of the Act as a jurisdictional basis for her action runs afoul of the express language in Mandel.

Finally, appellant contends that the District Court erred in granting the appellee's motion for summary judgment because of the conflict between "the parties Rule 9(g) statements." While the bona fides of appellant's marriage to Gomez-Tejada present the central issue going to the merits of the case, there are no factual controversies which are material to the legal grounds on which the government relied on its motion for summary judgment. Those legal contentions, therefore, were ripe for resolution on the motion for summary judgment. See Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2d Cir. 1975).

CONCLUSION

The order of the District Court should be affirmed and the appeal dismissed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York
Attorney for Defendants-Appellees.

MARY P. MAGUIRE
Special Assistant United States Attorney

- Of Counsel -

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 76-6009

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

25th day of March, 1976 s he served ~~X~~ copy s of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Antonio C. Martinez, Esq.,
324 West 14th St.
NY NY 10014

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

25th day of March, 1976

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1978